PETROLEUM TANK RELEASE COMPENSATION BOARD
MINUTES
Business Meeting
February 5, 2007
Department of Environmental Quality
Metcalf Building Room 111, 1520 East 6th Avenue
Helena, MT

All Board members were in attendance. They are Theresa Blazicevich, Frank Boucher, Greg Cross, Steve Michels, Roger Noble, and Shaun Peterson. Adele Michels joined the meeting by teleconference phone. Also in attendance were Terry Wadsworth, Executive Director, and Paul Johnson, Board attorney.

Presiding Officer Cross called the meeting to order at 10:02 a.m.

Approval of Minutes

Mr. Boucher moved to accept the minutes of the December 11, 2006 Board meeting. Mr. Peterson seconded. **The motion was unanimously approved.**

Mr. Wadsworth noted that he felt the Board would benefit from an explanation of the decision process through which administrative orders are generated, as there are several claim adjustment disputes on the agenda as a result of such orders. He introduced Bill Rule, Underground Storage Tank Program.

Mr. Rule indicated the goal of his presentation is to give the Board a context for how the enforcement program functions in the Underground Storage Tank (UST) program, and how that relates to the Board's reimbursement regime. He reminded the Board that the Stacey Oil matter addressed at the August, 2006 meeting was the result of an administrative order. In that case, Stacey Oil appealed the claim adjustment made according to statute as a result of the administrative order. The Board ultimately elected to revise the adjustment suggested by statute to 10%, based on information provided at the meeting. Mr. Rule indicated that he hoped to explain the letter of the statute, as well as explain the fairness issue that is going to come up repeatedly in the future. He explained that, among other things, the UST Section runs the third-party inspection program required by the 1999 legislature, which ties into operating permits. Operating permits are essential to eligibility for the fund. The Board and the Section dovetail through the regulations that require owner/operator financial responsibility, with the Board providing the major portion of that responsibility. The Board and the UST Section also dovetail through the eligibility and reimbursement requirements, and closures and site assessments.

Mr. Rule explained how enforcement cases arise out of the Section's third party inspection process and that there are compliance assistance opportunities available to owners and operators before a matter is sent to enforcement. Since the 1999 legislature, the Section has developed a matrix of violations and their degree of severity or significance. There are three classifications of violations; major, moderate and minor. Major violations equate to significant non-compliance. An active site must be inspected every three years. The significance of a violation relates to risk of harm to human health or the environment and extent of deviation from the rule. During the years 2004 through 2006, 1589 inspections were conducted, with 13% having major violations, and 8% having minor violations with no major violations. Therefore, 79% of the sites inspected were granted an operating permit without further requirements. 83 sites were referred for enforcement actions, with 43 occurring in the last six months of 2006. The most important factors in avoiding enforcement actions are: operate properly, get inspections early to provide an opportunity to correct violations before the operating permit expires, and discuss disagreements with the DEQ early. Compliance issues can be appealed to the Board of Environmental Review (BER).

Formal enforcement activity occurs in three situations: (1) when an active facility does not get an inspection before their permit expires, (2) when a major violation is uncorrected when an operating permit expires, and (3) when a moderate violation is uncorrected after six months. Mr. Rule explained the process, using the example of a facility that had not had a corrosion protection test done in more than three years. Violations are entered into a database, which then populates with information concerning the severity of the violation from the Section's violation table. A violation letter is then produced that describes the violation, including a description of the violation and a citation to applicable rules, corrective action required to cure the problem and return to compliance, and a time table to accomplish the action.

With regard to the question of leak detection records, the rules require the owner/operator to retain 12 months of such records. In the event an owner/operator is missing those records for a period of months, it is not possible to come back into compliance with the rule until twelve months of records are available. Some have argued that a history report showing there were no leaks should be sufficient. Such history records can show that there was no leak, but cannot show

that the owner/operator checked each month to see whether there were any leaks in the system. DEQ is concerned as much with the pattern of compliance as with detection of the leak.

In the mater of leak detection records, Mr. Rule noted that, once the matter has gone through the enforcement process, been addressed through fines and corrective action, and had the opportunity for appeal to the BER, the matter comes to the Board, which then penalizes the owner/operator by reducing reimbursements through the Board rules. Mr. Rule noted that, in such cases, since the facility cannot come into compliance for a full year, the Board's reimbursement will be reduced to zero, according to the Board's rules, which is not equitable to the owner/operator.

Lee Bruner, a spectator, addressed the Board, noting that when the Board created the schedule of penalties in 17.56.336(7), the goal was to allow the Board the flexibility to consider multiple factors in determining the need for and amount of penalty applied to a particular non-compliance.

Mr. Peterson informed the Board that he will abstain from voting on the disputes concerning On Your Way and Ezzie's, as they are clients of his firm. Mr. Michels stated that he will abstain from voting on the On Your Way matter, as he has a business relationship with the owner.

Dispute of Claim Adjustments – Grain Growers Oil Co., Glasgow, Rel. #2461

Mr. Wadsworth stated that a request to postpone this matter had been received from the owner/operator in this matter.

Mr. Noble moved to postpone the Grain Growers matter until the April 2, 2007 meeting. Mr. Boucher seconded. **The motion was unanimously approved.**

Dispute of Claim Adjustments – Flying J, Belgrade, Rel. #3519

Mr. Wadsworth stated that the Flying J-Belgrade matter involved an Administrative Order (AO) dated April 3, 2006. The AO was resolved January 5, 2007, resulting in the owner being out of compliance for 224 days. Violations included failure to conduct release detection monitoring and maintaining records and failure to report a suspected release within 24 hours. A $14,000 fine was paid.

Mr. Wadsworth explained that in accordance with 75-11-309(2) the Board suspends payment of claims when an AO is issued. When an AO has been satisfied, the Board may pay those suspended claims according to criteria established by the Board in ARM 17.56.336. The period of noncompliance determines the initial penalty applied to the site. As stated in that rule, if a site is out of compliance for a period of 180 days, the reimbursement that is granted is zero. The question before the Board is what degree of reimbursement does the Board want to provide to the Flying J-Belgrade release? This matter is similar to the Stacey Oil matter addressed at a previous, meeting, as are the Grain Growers matter and the On Your Way matter. There will likely be similar matters addressed at future meetings.

Mr. Peterson asked for confirmation of his understanding that the release is eligible, the AO comes after the fact and the AO is affecting the payment of claims on the eligible release.

Mr. Wadsworth confirmed his understanding. He also noted that in this case the reimbursement percentage has been reduced to zero, per 17.58.336(7) because the facility was out of compliance for more than 180 days. He indcated that Mr. Rule had raised the issue of fairness, because in the case of recordkeeping violations, it is often not possible to come back into compliance before the percentage is reduced to zero.

Mr. Johnson reminded the Board that the same issue occurred in the Stacey Oil case, where the Board determined to penalize the owner/operator by 10%, allowing 90% reimbursement, based on the owner/operator's prompt action and efforts to return to compliance as quickly as possible.

Mr. Bill Frisch, Controller of Flying J addressed the Board. He noted that there were a couple of violations at the site. The ones that could be corrected immediately were corrected. He contended that the facility did have records that proved there were no releases at the site during the time for which DEQ says there were no monthly leak detection records, but that those records were not accepted by DEQ as adequate. He noted Flying J had used that type of record in past inspections, that there were tags for the tanks, and that no one in the past had told them their records were not appropriate. The inspection report noted that seven months of records were available, and the reason the other five months were not acceptable was that two tanks were manifold together. He argues that Flying J had the records, which showed there were no releases, so there was no concern for public safety.

Mr. Cross asked for clarification that Flying J had two tanks manifold together, took a reading from one tank, because the levels would be the same for both, and recorded that information.

A representative of Flying J responded that they actually took readings from both tanks, and combined the total gallons for their records.

Mr. Peterson asked for confirmation that the facility had passed prior inspections using the same method of inventory control, and that the State conducted the inspections.

Mr. Frisch confirmed that prior inspections had found the method of record keeping acceptable. The inspections were done by a third party, for the state. In addition, now that they know the method they used was unacceptable, they have changed. It is impossible to come into compliance in less than a year, and he feels they should be reimbursed 100%, since they were keeping records. He also indicated that the method they had used prior to the AO is acceptable practice in other states and with the federal government.

Mr. Cross asked for an explanation of the two claims at issue – 20060414F and 20060703P.

Mr. Wadsworth explained that according to the rule the two claims were adjusted and the owner/operator notified of the adjustment. That action allows the owner/operator to dispute the adjustment and bring the matter before the Board. The work is being done on an existing release. The intent of the Fund is to encourage owners and operators to operate in an environmentally safe manner, and the law and rules are implemented with that objective. He indicated that in cases where maintaining leak detection records is at issue, adjusting the reimbursements to zero is probably not a fair and equitable way of reaching that objective. When trying to arrive at a more equitable reimbursement adjustment, it may be helpful for the Board to examine how the DEQ Enforcement Division calculates its administrative penalties.

Presiding Officer Cross stated that his understand is Mr. Rule feels the punishment does not fit the "crime" in this instance, and asked Mr. Rule if that is his belief. How does the Board arbitrarily come up with a reimbursement when the guidelines are set forth in the rules.

Mr. Rule stated that he thinks it is important to separate the Department's enforcement procedure from what the Board chooses to do with that procedure. He believes the rationale behind the Board currently using DEQ's compliance scheme to determine eligibility and reimbursement is that it in some way helps protect the environment. He does not believe that is valid and advocates the Board not use compliance in its determinations.

Mr. Johnson asserted that the idea of compliance is inextricably tied to the Board statutes and rules. Since the fund was created and the statutes involving the fund were first enacted, compliance has been one side of the coin with respect to the whole statutory scheme and rulemaking. The fund was created to help cleanup petroleum releases in a market where insurance products are not available to cover the risk of contamination and cleanup, and, the legislature was clear, to extend coverage for that type of risk when owners and operators are in compliance with rules and requirements related to safely operating petroleum storage tanks in a way that does not negatively affect the environment.

Mr. Wadsworth reminded the Board that prior to 2005, an owner/operator who became eligible for fund reimbursement was required to remain in compliance to maintain eligibility. It was determined that the penalty involved was too harsh and the legislature moved the requirement for compliance from the eligibility statute to the reimbursement statute, where the Board has some flexibility to adjust the penalty on a case-by-case basis and make the penalties more equitable. In this way the owners/operators are on notice that operating in an environmentally safe manner is an important issue to the Board and the Fund.

Mr. Johnson noted that the Board recently amended its rules to provide itself discretionary means to address the fairness issues raised by Mr. Rule. ARM 17.58.336(7)(e) allows the Board to alleviate the harshness of penalties imposed by the table in ARM 17.58.336(7)(a), by adjusting the percentages set forth in that table, taking into account some or all of several factors listed in subsection (7)(e), in each individual case. Because these types of matters will come up again, Mr. Johnson also counseled the Board to treat owners/operators in similar situations alike, so there is some consistency in their determinations.

John Arrigo, Administrator of DEQ Enforcement Division, addressed the Board to explain how the Division arrives at penalties issued under all the various statutes the Division administers. There is a standard set of penalty rules that apply to all the statutes. The purpose of a penalty is to provide a deterrent to future violations by that violator and others, and to level the economic playing field so that there is no financial advantage to operating in violation of the law. Those elements are factored into penalty calculations. He noted the Enforcement Division has recently changed their requirements to only require submission of 3 months of leak detection records, which may reduce the number of matters

that come before the Board. He also indicated that the amount of the penalty assessed by the Division is in proportion to the egregiousness of the violation.

Dan Kenny, Enforcement Division specialist for the tank program, suggested that the Board not look at the length of time the owner/operator was out of compliance, but whether and how quickly they complied with the requirements of the AO when determining the amount of reimbursement penalty to apply. He commended the Board for its decision in the Stacey Oil case, and stated he believes it was a wise and fair decision. It sends a message to others in the industry that there is a consequence for not operating their facilities in compliance with applicable laws and rules. In the Flying J case, he noted that Flying J did come into compliance with the order, had a suspected release that was not reported, and had insufficient leak detection monitoring records at the time of the inspection. Leak detection records violations are the most commonly cited violations in the program. He noted that administrative penalties have not gotten the attention of owners and operators as quickly or firmly as has the Board's current rule tying administrative orders from the Department to claims reimbursement.

Mr. Noble asked whether the suspect release was based on lack of recordkeeping.

Mr. Kenny stated that the records examined during the inspection in 2005 showed several failed monthly monitoring results that were not reported to DEQ.

Mr. Rule noted that not every failed result needs to be reported; however, if failed results are not reconciled by follow-up results, they should be reported to DEQ. In this case, the records examined were not adequate for the Departments requirements. However, there was not an actual release at the site, despite the failed tests.

Mr. Trombetta corrected Mr. Rule's statement. At the present time, <u>all failed tests</u> must be called-in to the Department within 24 hours.

Mr. Frisch noted that, from Flying J's point of view, there was no failed test and, therefore, no suspected release to report, because they did not know their leak detection monitoring method was not acceptable to DEQ until after the inspection. As a result he feels there should be no reporting penalty in this case.

Responding to a question from Mr. Michels, Mr. Frisch indicated they had passed at least two inspections, with the same reporting techniques, before they failed the inspection. They have been in Montana for nine years without any problem.

Ronna Alexander, Petroleum Marketers Association, said she noticed there is a misunderstanding between the UST Section, and the tank owners and inspectors where records are concerned. She suggested that before the Board starts making decisions about penalties for violations that may not be true violations, the subject be investigated a little further.

Mr. Wadsworth suggested that, if the owner/operator feels there should not be a violation, the Board table the matter until Flying J could appeal the violation to the Department. Flying J indicated that the time for such appeal has expired.

Mr. Kenny noted that when the owner/operator signs the inspection report he is certifying that the violations noted in the inspection were explained to him, and that whatever is on the inspection report is true and correct. In addition, there are several opportunities to dispute facts and arguments, both before and after AO is issued.

Mr. Noble asked what the Department saw different in this inspection that they did not see in previous inspections.

Mr. Kenny noted that the inspection process and the enforcement process were evolutionary in nature. As the program has developed, and there has been an opportunity to determine what works best, the requirements have become more stringent. They are learning that methods and recordkeeping people are using may not be adequate for the purpose of leak detection or the specific equipment being used.

Mr. Peterson moved to pay 100% of the claims based primarily on the fact that there is no significant impact to the fund and there appears to be no additional environmental hazard from the failure to report the suspected release. **The motion failed for lack of a second.**

Ms. Blazicevich moved that the percentage allowed to be reimbursed be zero percent because the owner/operator was out of compliance with inventory records and failure to report a suspected release within 24 hours. **The motion failed for lack of a second**.

Mr. Wadsworth noted that whatever adjustment was determined by the Board would apply to all present and future claims for releases existing at the site at time of determination. The adjustment would not apply to any future releases at the site.

Mr. Bruner stated for the record that according to 75-11-301, equal with protection of the environment, the fund was set up for the purpose of providing adequate financial resources and effective procedures for corrective action and payment for damages caused by petroleum tank releases.

Mr. Rule addressed the board and stated that his conscience demands that he make clear that, given the information presented by Flying J, he cannot prove that Flying J is wrong about the compliance issue.

Mr. Peterson reintroduced his motion to pay the claims 100% because there has been no significant impact to the fund, there has been no additional environmental hazard, the site passed prior inspections, and they paid the fine required by the Administrative Order and are working again in compliance. Mr. Boucher seconded.

Mr. Boucher remarked that, prior to Mr. Rule's most recent comment, he was going to suggest reimbursement at 90%, but in view of the comment that the Department cannot, in fact, say the records aren't exactly right, he does not see how the Board can not give the owner/operator 100%, because the Board does not know Flying J did not comply.

A roll call vote was held. Mr. Boucher, Mr. Michels, Mr. Noble and Mr. Peterson voted to approve. Ms Blazicevich and Ms. Michels voted no. **The motion was passed four to two.**

Dispute of Claim Adjustments – On Your Way, Great Falls, Fac ID #0709699, Rel. #363

Mr. Peterson reminded the Board and audience that he is abstaining from participation in this matter. Mr. Michels made not that he is also abstaining from this matter.

This matter involves an Administrative Order dated September 6, 2006 that was resolved January 3, 2007. The owner/operator was out of compliance for 119 days, and paid an administrative penalty of $1740. The violations cited were failure to conduct release detection, failure to maintain release detection records, and failure to provide spill and overfill equipment meeting standards. The release was granted eligibility at 50% in September, 2000, because when the release was discovered half the tanks were in compliance and half were out of compliance and it could not be determined which tank had the release. As a result of the AO and the length of time to return to compliance, the rule allows reimbursement at 25% of the original eligible percentage, which results in 12.5% reimbursement.

Charlie Vandam, PBS&J, addressed the Board on behalf of the Kay and Bruce Wheatley, owner/operator. He noted two issues he wished to discuss; (1) the administrative order and (2) historic contamination found in a different area of the property after the release was identified. He hoped the Board would consider both issues in an adjustment to claim reimbursement and grant the owner/operator reimbursement at 84% of costs. In 2000, the release was granted 50% eligibility because tanks 1, 2, and 3 lacked leak detection. Subsequent investigations discovered contamination on the north side of the property in the vicinity of an old tank basin, from which the tanks were removed in 1985, before the Wheatleys bought the property.

Mr. Vandam feels that the adjustment is being unfairly applied. The Wheatleys have already paid a fine and done what they could to stay in compliance. He contends that approximately 68% of the contamination removed in 2006 was associated with the release in the pre-1985 tank basin. In response to a request to grant a separate release number to the historic contamination, DEQ has stated that it is their policy to address all historic contamination discovered on a property at the time a release is discovered as a single release. Mr. Vandam requested that, since the contamination associated with the pre-1985 tank basin is clearly a distinct release and not the fault of the Wheatleys, the portion of the cleanup associated with that contamination be reimbursed at 100%. In addition, he requested that the cleanup associated with the remainder of the contamination be reimbursed at 50%, and not subject to any further reduction.

With regard to the administrative order, he stated the Wheatley's maintained line leak detection records they believed were acceptable. Upon notification of noncompliance after the inspection, the owner elected to temporarily close the tanks and completed temporary closure on the day the operating permit expired. Over the next few months the owner decided to close the facility and remove the tanks. After several weeks of negotiation on the cost to remove the tanks, the permit to remove the tanks and the administrative order were both issued on September 6, 2006. Mr. Vandam noted that the Department was aware the Wheatleys were attempting to close the tanks, and yet still issued an administrative order. The tanks were removed on September 27, 2006. As it happened, the Wheatleys notified the Department of the closure in a letter, rather than using the Department's form, which is due within 30 days. He noted as well, that the violations did not cause any additional contamination.

Mr. Kenny commented that the AO was issued for violations noted when the compliance inspection was conducted, regardless of the status of the facility at the time of the AO. In cases where the owner elects to close the tanks, the

Department determines the date of compliance as the date when they receive the paperwork showing the tanks have been properly and permanently closed. In this case, the AO was issued September 6, 2006, and tank closure paperwork was received December 11, 2006. When they removed the tank, they came into compliance; however, all the closure paperwork was not filed until more than two months after the tanks were closed.

Mr. Vandam noted that a good deal of contamination was discovered once the tanks were removed, and the paperwork was not completed until most of the site was cleaned up. He feels that the penalties are being applied unjustly, because when the Wheatleys realized they had a problem, they took steps to close the tanks, and satisfied the order when they removed the tanks.

Burl French spoke, noting that the Board needs to understand that the Department, the installers/removers and the owner/operators are learning as they are going along in the process. The difficulty he sees is that the owner/operators are not given the same leeway to make adjustments that the Department is given. It is difficult for owners/operators to come into compliance with some matters in less than twelve months. This will be a recurring problem, as technology advances. It is not appropriate for the owner/operator to take the penalty for the learning curve.

Mr. Rule told the Board that after the first round of third party inspections, leak history reports were no longer acceptable. In an effort to inform the owners/operators of that fact, a notice was published in the MUST News, in DEQ's inspector training and wherever else they could. Unfortunately, DEQ does not know what records the inspectors are looking at when they inspect. He also stated that if a facility is in major non-compliance when the operating permit expires, the facility will be sent to enforcement, regardless of the work being done at the site.

Bruce Wheatley, owner of the facility, told the Board that, with regard to leak detection records, he was given conflicting statements about whether he was in compliance from the inspector and the state. As well, he thought that when the tanks were emptied and temporarily closed in March, there was no further risk of a release and any violations would be satisfied.

Presiding Officer Cross asked if there were further questions or statements. There were none.

Mr. Wadsworth recommended that the Board move for the adjustment that is the issue before the Board. He stated that the eligibility determination was made in 2000 and the change in eligibility requested by Mr. Vandam should not be addressed at this meeting. If the owner wishes to dispute the 2000 decision, the law provides a vehicle through the Montana Administrative Procedure Act to make that appeal. In addition, the Board's procedures have changed over time. When the Board was first created, eligibility determinations were not made until the first claim was submitted. When the first claim was received, eligibility and claim reimbursement were handled together. This gives rise to the impression that the 50% adjustment to eligibility for this site was merely a claim adjustment, when it was not. More recently, the laws have changed and eligibility is addressed separately from claim reimbursement to allow for more clarity

Mr. Vandam reiterated his request that the original 50% penalty and the current AO penalty be waived on the historic contamination discovered in the pre-1985 tank basin not included in the original release determination. That contamination is approximately 68% of all the contamination. In addition, he is asking that the AO penalty be waived on the remainder of the release. Taken together, this would mean that claims would be reimbursed at 84%.

Mr. Noble moved that the Board approve 80% of reimbursement of this claim based on the fact that the tank closure reports were not filed within 30 days and because of the other four violations. Mr. Boucher seconded.

Mr. Wadsworth asked for clarification that the 80% reimbursement would be 80% of the current 50% reimbursement percentage.

Mr. Noble replied that is correct. He believes the Board cannot go back and supersede a previous Board's decision with regard to eligibility without an appeal from the owner/operator.

Mr. Vandam noted that the owner had originally asked DEQ to assign a new release number to the historic contamination and was refused. It will be difficult for the owner to remain solvent when reimbursement is reduced to 40%.

Mr. Noble stated that the reason he made the motion to focus on the 50% reimbursement was (1) this Board has not had the opportunity to review the information the previous Board reviewed when they made their decision, so it is not appropriate to change their determination, and (2) he did not see any new evidence come forward to support Mr. Vandam's recommendation concerning the historic contamination.

Mr. Johnson noted that there is no provision in the Board's statutes or rules for the Board to go back and revisit an eligibility decision. If there is a contest after the Board has made a decision, the correct procedure is to apply for a MAPA contested case proceeding, which is a full evidentiary proceeding.

Sandi Olsen, Division Administrator, DEQ, suggested that the Board look at the motion as it applies to the 50%. Then it might be useful for Paul Hicks and the Department to revisit the issue Mr. Vandam raised about whether the percentage split between the historical releases and the more current releases was appropriately set, in light of information not available at the time the original decision was made.

Mr. Johnson suggested that if research is to be done, he recommended the Board look back at the minutes of the 2000 meeting and figure out how the 50% allocation was determined. If there was an eligibility determination by the Board, he could look at the legality of the decision if the Board wished. If it was not an eligibility decision, but just a decision about a claim, there may be some potential for making an adjustment. Other than a MAPA proceeding, he does not know of another way to change an eligibility decision made by the Board in the past.

Upon request of the chairman, **Mr. Wadsworth restated the motion**. The motion was that, based on the tank closure reports not being files within 30 days, and because of the other four violations in the administrative order that is at issue, the reimbursement associated with releases at the facility be reduced by an adjustment of 20%, resulting in 80% reimbursement on a release that is 50% eligible.

A roll call vote was held. Ms. Blazicevich, Mr. Boucher and Mr. Noble voted to approve the motion. Ms. Michels voted against the motion. Mr. Peterson and Mr. Michels abstained. **The motion was approved.**

Dispute of Claim Adjustment – Ezzie's Wholesale, Malta, Claim #20060426H

This matter involved a $750 adjustment for removal of an AST. The Board's policy is that tank removal is not a reimbursable cost except under certain circumstances. The policy became effective January 18, 2000 and allows for reimbursement of tank removal costs only when (1) removal is required as part of an approved written corrective action plan, (2) removal facilitates the most cost effective corrective action, (3) the removal is not part of a tank replacement, and (4) the owner/operator obtains three competitive bids for removal of the tank. The policy ensures that the fund provided for in 75-11-313 is being used in the most efficient manner, provides appropriate opportunity to review the circumstances surrounding the tank removal and ensures an equitable cost. The staff denied the cost for removal of the tank, because it was not included in a written corrective action plan, and three bids were not obtained for removal of the tank.

Ms. Blazicevich moved to deny the claim for tank removal. Ms. Michels seconded.

Earl Griffith, Tetra Tech, addressed the Board. He remarked that removal of the tank was part of an emergency response, and was critical to the ability to access the soil most severely affected by the catastrophic release from the AST. Since it was an emergency response, the discussions about corrective action were conducted by telephone on the Monday morning following discovery of the release. All his efforts were focused on actions to minimize the impact of the release and to clean it up in the most cost effective and efficient manner. The weather was poor and deteriorating. The tank removal required a 40 ton crane, which had to come from Havre. There are not many cranes available in the area. It was essential to move quickly.

Mr. Noble asked if Mr. Griffith had a copy of the email from Bill Hammer (DEQ) that was referenced in his letter requesting to appeal the denial of costs.

Mr. Griffith indicated that he probably did.

Mike Trombetta, Bureau Chief, Hazardous Waste Bureau, addressed the Board and indicated that the Department is in agreement with Mr. Griffith that the reimbursement should be approved.

The motion was unanimously defeated.

Mr. Noble moved to reimburse the $750 tank removal cost. Mr. Michels seconded. **The motion was unanimously approved.**

Eligibility Ratification

Mr. Wadsworth informed the Board of the eligibility applications before the Board. There are recommendations for five sites to be eligible and one to be ineligible. An inspection at the Foley's Quality Service in Hall indicated violations, resulting in the recommendation for ineligibility.

Mr. Peterson moved to ratify the eligibility determinations contained in the eligibility table. Mr. Noble seconded. **The motion was approved.** Ms. Blazicevich abstained from voting on the North Star Aviation site in Hamilton.

Board Staff Recommendations Pertaining to Eligibility From Nov 28, 2006 thru Jan 19, 2007				
Location	Site Name	Facility ID #	DEQ Release # Release Year	Eligibility Determination – Staff Recommendation Date
Hall	Foleys Quality Service	20-05514	2163 3/24/94	Ineligible – 11/27/06
Billings	Former Lucky's Auto Sales	60-15048	4499 7/20/06	Eligible - 12/6/07
Billings	Nilson lot	60-15052	4510 1/16/06	Eligible – 01/2/07
Whitefish	City of Whitefish	56-13822	4454 9/12/97	Eligible – 1/8/07
Hamilton	North Star Aviation	99-95007	4414 5/23/05	Eligible – 1/19/07
Lolo	Former Granite Hot Spring	99-95041	4536 10/26/06	Eligible – 1/18/07

Claims over $25,000

Mr. Wadsworth presented the Board with the claims for an amount greater than $25,000 reviewed since the last Board meeting. (See table below). There are six claims totaling $536,299.59. There were adjustments to three of the claims; 20061016A, 20070118A, and 20070102C for various reasons.

Ms. Blazicevich moved to ratify the claims greater than $25,000. Mr. Boucher seconded. **The motion was unanimously approved.**

Location	Facility Name	Facility ID#	Claim #	Claimed Amount	Reimbursed
Shelby	Town Pump	51-09749	20061016A	$40,211.82	$29,223.70
Great Falls	Black Eagle Cenex	7-00004	20061207H	$25,312.20	$25,312.20
Kalispell	Manion's Implement Dealership	15-04503	20070104F	$144,203.15	$144,203.15
Kalispell	Equity Supply Convenience Store	15-05069	20070118A	$237,707.13	$237,437.10
Wolf Point	Rick's Exxon	43-02484	20061204S	$64,962.21	$61,409.81
Wolf Point	Rick's Exxon	43-02484	20070102C	$41,050.15	$38,713.63
Total					**$536,299.59**

Presiding Officer Cross noted that, along with the weekly reimbursements, this is a very large amount of money to spend. He asked that a specific note be made that the Board is concerned about the claims greater than $25,000 and it will be addressed during the financial report later in the meeting.

Weekly Reimbursements

Mr. Wadsworth presented to the Board for ratification the summary of weekly claim reimbursements for the weeks of December 6, 2006 through January 17, 2007. (See table below). There were 223 claims, totaling $642,386.84. In addition, three claims for a site in Lewistown were denied because the release was ineligible.

Mr. Peterson moved to ratify the weekly claim reimbursements. Mr. Noble seconded. **The motion was unanimously approved.**

WEEKLY CLAIM REIMBURSEMENTS February 5, 2007 BOARD MEETING		
Week of	**Number of Claims**	**Funds Reimbursed**
December 6, 2006	18	$91,062.85
December 13, 2006	32	$93,579.63
December 20, 2006	27	$91,573.11
December 27, 2006	26	$91,842.32
January 3, 2007	45	$93,356.40
January 10, 2007	45	$90,824.73
January 17, 2007	40	$90,147.80
Total	**233**	**$642,386.84**

The Board took a ten minute break at 1:09 p.m. The meeting resumed at 1:19 p.m.

Board Policies

Mr. Wadsworth noted that the Board has implemented eleven policies since its inception. These policies provide important guidance to the staff on how to conduct business. During recent discussions on a proposed travel reimbursement policy, it was suggested that the Board's policies be proposed as rules, rather than policies. Mr. Wadsworth brought the matter before the Board to allow an opportunity for the Board to discuss how it wants to proceed with regard to its policies.

According to Mr. Johnson, the legislature provided a method for the Board to exercise its discretion in administering the fund and the program, through rulemaking. The legal process for the Board to do something administratively in the way of policy or procedure is to conduct rulemaking.

Mr. Wadsworth stated that the objective of this discussion is to introduce the matter to the Board, and receive guidance on its wishes. If it is improper implementation to have policy, and it is more proper to have administrative matters addressed through rule, the Board may wish to look at its policies, decide whether they reflect the way the board wants to conduct business and promulgate those policies as rule. He noted that the policies have been in place for some time, seem to be working well, and could be made into rules without much change.

Presiding Officer Cross noted that moving the policies to rule would limit the Board's discretionary freedom, but would also decrease the need to wrestle with some of the issues before it.

Mr. Johnson noted that the process to change a rule is a bit more involved than making changes to a policy. He also noted that a rule is more legally defensible than a policy.

Mr. Peterson expressed the opinion "if it is not broken, don't fix it," and asked if the policies are being challenged.

Mr. Wadsworth stated that as the Fund Solvency Subcommittee has been evaluating ways to control costs, it developed a proposed a policy concerning reimbursement of travel costs and sent it out for review and comment by the consulting industry and owners/operators. An industry member commented that he did not see a provision allowing the Board to establish policies, while it does have the authority to establish rule. Mr. Wadsworth noted that the Board is required to keep a list of persons interested in notification of changes to the Boards rules. Although the interested parties list is used for policy changes, there is no law requiring such a list for those interested in changes to Board policies.
As a result of the comments, the Subcommittee will be developing a rule concerning reimbursement for travel. Mr. Wadsworth wanted the Board to consider whether it wants to move some or all of the policies to rule, at the same time. He also commented that using policy to determine whether a particular suggestion will work as intended is probably alright, but once it is determined to be workable, it should probably be moved to rule.

Mr. Johnson noted that if no one is coming in and challenging the policies, it is probably not necessary to get the move to rule done right away, but it should be evaluated as a long term goal.

Mr. Wadsworth told the Board that the minimum bid policy and the tank removal policy are likely the most frequently challenged, and will be so in the future.

Presiding Officer Cross expressed the concern that there needs to be enough flexibility to address emergency situations in the quickest, most cost effective manner.

Mr. Wadsworth suggested that the Board members be given an opportunity to review each of the policies and make a recommendation at a future meeting. Presiding Officer Cross agreed.

Proposed Legislation

Mr. Wadsworth noted that several possible legislative proposals for the 2007 Legislature have been discussed at recent Board meetings. In addition, other proposals for legislation have been directed to him by various parties in recent weeks. He stated that Representative Klock agreed to carry the Board's legislation, developed as outlined in Ms. Blazicevich's motion at the December, 2006 meeting. Representative Klock was contacted by some of his constituents with concerns and he asked that the Board hear from them at its February meeting. To that end, Golden Valley County prepared proposed legislation and attended the meeting to present their proposal for the Board's consideration. Mr. Wadsworth also noted that representatives of Broadwater County were in attendance to discuss their concerns with an abandoned property in Townsend. Also a representative from Powell County attended the meeting. Representative Peterson of Billings had also proposed a bill of which the Board should be aware.

With the assistance of Board Counsel, DEQ counsel and Legislative Services Division bill drafters, the Board staff created a bill to present to Representative Klock. The language would: (1) encourage use of insurance by allowing owners/operators to use payments for cleanup made by their insurance company to offset the co-pay required by the Board, (2) increase the co-pay for single and double-walled tanks, and heating oil tanks, (3) cap the Department's administrative cost at 15% of the fee revenue, (4) change the word "immediate" in 75-11-309, and (5) temporarily increase the fee. The bill was designated LC2310.

Golden Valley County provided some draft language to modify the Board's statute (§75-11-307, 308 & 309, MCA) to accommodate local government entities. Golden Valley has a concern with an abandoned petroleum leak site in Ryegate. There is free product on the water table that could threaten the public water supply if the water table rises, as well as threatening the river nearby. The county does not have the funds to acquire and cleanup the property.

The Broadwater County concern is also with an abandoned property. Their proposal is, in cases where an abandoned property is subject to an administrative order, to allow the Board to renegotiate an appropriate resolution of any existing AO at the request of the affected county administrators, and to allow the Board to guarantee, in writing, reimbursement of eligible costs not yet approved by the Board. The county cannot absorb the costs of cleanup without assistance.

Mr. Noble asked why some of these sites that have insolvent owners or abandoned properties are not turned over to the LUST and handled with federal dollars.

Mr. Trombetta indicated that many of them do have work performed under the LUST program, but that program has a very small budget. Some are evaluated and found to not be an immediate threat. The LUST fund can basically do initial evaluation to determine severity, in most cases, but no serious cleanup. LUST dollars cannot be used on above-ground tanks, residential heating oil tanks, or farm tanks.

Ms. Olsen added that in some cases, DEQ can seek a resource and development grant (RDG) for sites that cannot be addressed either by the LUST program or the Petro Fund.

Mr. Wadsworth stated that the counties do not want the burden of the petroleum contamination and cleanup cost and do not want the burden of the third-party liability from a contaminated property, so abandoned properties just sit there. He has discussed possible options with the counties, including splitting the costs of cleanup 50/50 between the Board and the county. The counties may have manpower and equipment available to conduct some of the remediation work themselves, at substantial cost savings. He also researched the Board's database and determined that there have been about a dozen third party damage payments made to date, averaging about $36,000 each.

Ms. Blazicevich commented that counties need to have a mechanism to cost recover the cleanup costs if a property reverts to the county for failure to pay taxes. Perhaps some language could be inserted allowing counties to put liens on abandoned properties for cleanup costs.

Mr. Boucher clarified that any arrangement made would only be for abandoned properties the county acquires, and not for releases the county caused.

Tom Livers, Deputy Director DEQ, addressed the Board regarding the procedure for agencies and boards to develop, draft and secure sponsorship for legislative proposals. As he noted at the December meeting, the process usually begins during the spring before the legislative year, with proposals being developed and refined during the spring, summer and early autumn, then submitted to the Governor's office for approval. The proposal currently before the Board is occurring quite late in the process, but must still receive approval from the Governor's office if it is to be introduced as the Board's legislation and be endorsed by the Board. If it does not receive approval from the Governor's office, individual Board members may testify in support of the legislation as individuals, but not in their capacity as members of the Board. He reiterated his concern that it is unlikely the Governor would support the fee increase portion of the proposal. The Department has concerns with the provision that will cap DEQ's administrative costs to 15% of fee revenues. He stated that the DEQ portion of the budget is not strictly administrative in nature, but are rather costs for a regulatory program, not administering the fund. The legislature chose the Petro fund as the source of funding for the regulatory program, and it is therefore not appropriate to compare the Montana funding percentages with programs in other states that are structured differently.

Ms. Olsen commented that, with regard to the Board's budget, the Department has made good faith efforts to reduce costs and help the Board meet its fund management objectives. She noted that the current projection for MDT revenues is $6.7 to $6.8 Million. The Board has been seeking quicker closure of sites. Dig outs are the quickest method to achieve that goal, but are very expensive. She has asked Mr. Trombetta to evaluate all of the PRS data and provide some information characterizing dig outs and their costs.

Presiding Officer Cross asked if DEQ could target a few sites that can be excavated and closed, so the Board can plan for a few sites per year.

Ms. Olsen noted that to accomplish that goal DEQ would need to characterize the universe of sites for which a dig out would be reasonable. She also will provide information on how post-cleanup monitoring fits into the process. She anticipated that DEQ could bring a report to the May meeting.

Presiding Officer Cross noted that the Board is likely to change in July and he would like to have this information presented before that time.

Mr. Wadsworth informed the Board of a proposal from Representative Peterson of Billings to amend the Board's statute (§75-11-307, 308 and 309, MCA) to reimburse 100% of cleanup costs for non-commercial tanks smaller than 1,100 gallons, at commercial facilities, not used by the current landowner. The bill would also amend the law to exempt this type of tank from compliance. There is no additional funding source provided for this coverage. The bill is designated LC2322.

The Board members expressed concern that the bill would result in fiscal impact to the fund, and discussed whether the Board should oppose the bill. After some discussion of the strengths and weaknesses of the bill, the Board decided to be ready to appear as informational witnesses on LC2322 to present information on the financial condition of the Petro fund and the limitations of the fund's ability to cover the costs associated with this proposal without additional funding.

Mr. Peterson moved that the Board provide informational testimony regarding proposed legislation LC2322 at legislative hearing hearings on the bill. Mr. Boucher seconded. **The motion was unanimously approved.**

There was a discussion between the members of the Board, Lee Bruner, Mr. Johnson and Mr. Wadsworth addressing the removal of the word "immediately" from §75-11-309(1)(a), as proposed by the Board's legislation. Mr. Bruner was concerned that the proposed statutory change would result in difficulty for owners/operators, because they would be required to report a release within 24 hours, under the Department's rules. He recalled that past legislative changes have been aimed at removing the 24-hour rule from the Board's purview. The discussion focused on the Board's desire to remove reporting from the eligibility requirement, but keep a reporting requirement as part of the reimbursement statue, and allow for flexibility in adjusting reimbursement percentages for failure to report a release within 24 hours. The legislation as proposed will allow the Board to consider whether such failure resulted in additional environmental damage or health threats.

Mr. Noble moved that the Board is satisfied with the language in the proposed legislation in LC2310 and will request that Representative Klock carry forward the bill as currently drafted, upon the Governor's approval. Ms. Blazicevich seconded. **The motion was unanimously approved.**

Mr. Noble moved to request that Board counsel work with Board staff and interested parties to develop language to address the needs of the counties with regard to orphaned and abandoned properties having petroleum releases, which can

be reviewed by the Board in preparation for the 2009 legislative cycle. Mr. Michels seconded. **The motion was unanimously approved.**

Fiscal Report

Mr. Wadsworth summarized the Board's current cash position and financial situation. The Board is currently projecting a deficit of $810,000 by June 30, 2007, the Fund has $1.2 Million in the bank, with $1.3 Million in estimated claims that are currently in process, and there will be approximately $500,000 in Board claims coming before the Board at the April meeting. He then asked the Board for guidance concerning the amount of money to retain in the bank, and balancing the Board's cash position with prioritizing payment of claims.

Presiding Officer Cross suggested prioritizing claims on necessity, allowing the staff to pay claims to smaller contractors, for whom delayed payment would present a significant hardship, before making payments to larger organizations, who might have less difficulty waiting for payment.

Mr. Wadsworth noted that, currently, claims are paid based on final review date and claim date, with the exception of claims greater than $25,000 (Board claims) that are paid as soon as they are approved by the Board, regardless of whether other claims were reviewed first. He remarked that if the decision is made to keep $1 Million in the bank, it will be immediately necessary to begin prioritizing claims and paying them as money comes becomes available. It is not possible to balance the fund with the current level of activity. The staff has crafted language to include in work plan review letters informing contractors and owners/operators that the costs reviewed are reasonable, but based on the financial condition of the fund, reimbursement will be delayed. The staff will also work with the Department to change the priority of the sites being addressed. The current average priority is 37.

Mr. Boucher moved to set the amount the Board will retain in the bank at $1 Million. Mr. Peterson seconded. **The motion was unanimously approved.**

Presiding Officer Cross asked for a motion to establish a process by which the staff can pay claims.

Mr. Peterson moved that the Board staff be directed to pay claims on the "first in complete" basis. That is, First-in – First-out for completed claims. Ms. Blazicevich seconded. **The motion was unanimously approved.**

Ms. Olsen suggested that the Board could choose to make dig outs a lower priority and elect to pay non-dig out claims first, then dig out claims up to a certain amount.

Mr. Peterson asked what the DEQ threshold is for site priority to address.

Mr. Trombetta stated that there is no established threshold. Sites are addressed for a variety of reasons, including the opportunity to address contamination as a part of other work occurring at a particular site, such as building demolition. The bulk of DEQ's time is spent on higher priority sites, but there are lower priority sites in the mix. He provided an explanation of how DEQ assigned a priority number to a site, based on human health and environmental impacts of the contamination. He showed a graphical analysis of the priority of all open releases, and compared it to a graph of the open sites being reimbursed by the fund. For sites addressed in the past two years the median site priority is 50. The average is about 35.

Mr. Boucher commented to Mr. Trombetta that, looking at the work plans listed in the Board Staff Report, 30% of the work plan dollars are targeted to sites with a priority greater than 50, while 70% of the work plan dollars are targeted at sites with a priority less than 50.

Mr. Peterson asked if it would be possible to raise the priority ranking so that the Board is not spending so much on sites with a priority under 50. Since the Board needs to decrease the amount it is spending, Mr. Peterson suggested spending more of the available money on higher priority sites.

Ms. Olsen asked if she understands correctly that the Board wants DEQ to look at a priority threshold from the top down on a monthly or bimonthly basis, and asked for clarification of what the bottom of the list should be. She will work with Mr. Wadsworth to make some short term recommendations, but hoped the Board would allow some flexibility.

Mr. Wadsworth noted that the objective is to bring the average priority of site conducting corrective action up to the point that the Fund can be balanced, and the owners/operators and the consultants can be reimbursed in a timely fsahion. As long as the average of the priority for all sites being addressed is moving up, the Department will have some flexibility to address lower priority sites where opportunistic situations arise.

Mr. Peterson moved that Board staff and the Department work together to increase the site priority and prioritization to a level that will enable the Board to pay claims and balance the budget, and that the staff and Department work out the details of how to do that. Mr. Boucher seconded. **The motion was unanimously approved.**

Board Attorney Report

Paul Johnson informed the Board that he is awaiting a response from Mr. Allen regarding dismissal of the Allen Oil MAPA case. He is also hoping to have the Castner case dismissed with prejudice by the next Board meeting.

In the Town Pump Dillon matter, Town Pump has filed a notice of appeal of the district court decision to the Supreme Court. Whatever the Supreme Court decides, the final decision should give the Board a firm rule about which law to apply when an application for eligibility is submitted to the Board.

Board Staff Report

Due to the lateness of the hour, Mr. Wadsworth, at the request of the Board Chairman, by-passed the Board staff report and moved directly to the Public Forum, since the PRS Section report was addressed during the discussion of the fiscal report.

Petroleum Release Section Report

Because it fit well with the discussion of the fiscal report, Mr. Trombetta provided the PRS report at that time. He noted that of the 42 releases discovered in 2006, 9 were from spills and overfills, with three of those being from bulk tank trucks, four from unattended nozzles. He noted that Technical Guidance Document #15, Prioritization of Petroleum Release Sites, addresses the Department site prioritization process, and can be found on the DEQ website.

Public Forum

Janelle Foley, Olympus Technical Services, spoke to ask the Board to pre-approve a $533,000 claim for the Stacey Oil dig out conducted in the fall of 2006. The subcontractor did the soil removal. The claim was submitted in January but staff had not been able to review it prior to the February meeting. The dig out was considerably larger than anticipated, 20 feet below ground surface and 10 feet below the water table, with contamination found throughout the entire site. While Olympus was becoming concerned about the cost of the excavation, the PRS project officer wanted to continue, and extend the excavation to the adjacent property. When informed that the funding might not be available, the excavation was discontinued. There is contamination along all four walls of the excavation, but the site was backfilled without any provision to mitigate bleeding of contaminants from the adjoining properties into the clean backfill, because of cost concerns.

Mr. Wadsworth indicated that the claim came in too late to be processed for the February Board meeting. He also indicated that the Fund is a reimbursement program, so it is the responsibility of the owner/operator to make payment on the invoice and seek reimbursement from the fund. He noted that if the Board approves this claim for payment here, and it is paid in accordance with the payment schedule adopted earlier in the meeting, no other claims that have been approved in the regular course of business will be paid for approximately five to six weeks.

Ms. Foley indicated that communication must be improved between DEQ, the Fund and the owners and operators.

The next scheduled Board meeting is April 2, 2007, in Room 111 of the Metcalf Building, 1520 East 6th Avenue, Helena, MT.

Meeting adjourned at 4:25 p.m.

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Greg Cross - Presiding Officer